IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1884 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GITA THEATRES

Versus

MUNICIPAL CORP.OF AHMEDABAD

Appearance:

MR MB GANDHI for Appellants

MR YM THAKKAR for Respondent

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 21/08/98

C.A.V. JUDGEMENT

Heard the learned counsel for the parties.

1. Admit. Shri Y.M. Thakkar waives service of notice of this appeal on behalf of the respondent. The appeal is taken up for final hearing with the consent of the learned counsel for the parties.

2. The appellants, filed this appeal being aggrieved

and dissatisfied with the order passed in M.V. Appeal No.11969/94 by 10th Small Causes Court, Ahmedabad on 20th February, 1998. The M.V.A. No.11969/94 has been dismissed by the learned court below on the ground that the appellants have not filed the appeal under section 406 and 407 of the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as `the Act, 1949') and Small Causes Court cannot decide the territorial jurisdiction.

3. Briefly, the facts of the case are that under the order dated 31st March, 1994 rateable value of premises belonging to the appellants, in dispute has been fixed by the Corporation for the year 1993-94. The appellants challenged this order before the learned lower appellate court by filing M.V.A. No.11969/94. One of the contentions of challenge to the impugned order raised by the learned counsel for the appellants before the learned lower appellate court in appeal was that the area i.e. Survey No.363 is not within the extended limits of Municipal Corporation. As the aforesaid survey number falls within the limits of the newly constituted new Rakhial area under the control of Rakhial Nagar Panchayat the rateable value fixed by the Corporation of the premises in question is without jurisdiction. Reference has also been made to the gazette notification dated 22-2-1986 under which the limits of the Corporation have been extended and therein Survey No.363 was also not included.

4. From the side of the Corporation before the learned lower appellate court it has been contended that though gazette notification specifically does not include the land of Survey No.363 within the limits of the Corporation but in the map attached to that notification, the land of aforesaid survey number is included and the Corporation was within its competence to fix the rateable value of the premises in dispute. The lower appellate court dismissed the appeal of the appellants on the grounds, as stated earlier. Hence, this appeal before this Court.

4. Learned counsel for the appellants contended that both the grounds given by the lower appellate court for rejection of the appeal of the appellants are perverse. The lower appellate court has not considered the substance of the matter. The appeal has been filed against the order fixing the rateable value of the premises in dispute and the appeal was maintainable under section 406 of the Act, 1949 against that order. Merely because the section has not been mentioned in the memo of

appeal, the lower appellate court has committed serious illegality in rejecting the appeal on that ground. The substance and not the form is relevant. It is urged that non-mentioning of the provision of law under which the appeal is filed on appeal memo is not fatal to its maintainability if the provision for the appeal against the impugned order is traceable in the Act. Lastly it is submitted that in the memo of appeal very specifically it is mentioned that it is a municipal valuation appeal. The subject of the appeal has also been referred to where the appellants have very categorically stated that it is an appeal against the order of the respondent-Corporation under which the rateable value has been fixed of the premises of the appellants for the year 1993-94.

5. As regards to the second ground given for the rejection of the appeal is concerned, the learned counsel for the appellants contended that the lower appellate court has acted illegally. The question - whether the premises falls within the limits of Corporation or not, is a question which can be gone into in the appeal filed against the fixing of the rateable value of the premises. The appellants have not challenged the validity of the Act nor any rule, regulation or bye-law framed thereunder nor it challenges the levy of the tax on the property situated within the limits of the Corporation. Its challenge was that as the premises in question do not fall within the limits of the Corporation, rateable value thereof could not have been fixed. In case this contention is accepted then it will amount to zero gross rateable value of the premises for the purpose of the Act.

6. On the other hand, learned counsel for the Corporation contended that the learned appellate court in the appeal under section 406 of the Act has no jurisdiction to go on the question - whether the area in which the premises is situated is within Municipal limits of Corporation or not. On being asked by the Court what is the remedy available in such matters to the aggrieved party, the counsel for the Corporation submitted that two remedies are available to the assessee i.e. either to file the civil suit or to file a writ petition under Article 226 or 227 of the Constitution before this Court. In substance, the learned counsel for the Corporation supported the order of the learned lower appellate court impugned in this appeal by the appellants.

I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

7. From the memo of appeal, I find that it is titled as `Municipal Valuation Appeal'. In the subject of the appeal, the appellants mentioned that they are challenging the order of the Corporation under which rateable value of their premises in dispute is fixed for the year 1993-94. Enclosed to the appeal, I find the list of documents filed by the appellants and at serial No.7 thereto the reference has been made to the order dated 31st March, 1994 of the Corporation under which the rateable value of the premises in dispute has been fixed for the year 1993-94.

8. The translation of the prayer made in the appeal is as under:

> To quash and set aside the proceedings fixing the assessment of the premises in appeal at Rs.1,53,795/- vide H.R. No.7 dated 31-3-1994 which was sent by the respondent on 19-5-1994 by considering Survey No.363 as Special Property Non- Residence, without there being any right or jurisdiction.

9. From this prayer it is clear that the appellants have challenged the order under which the rateable value of their premises in dispute has been fixed and specific prayer has been made for quashing of the order dated 31-3-1994. These facts are self speaking that the appellants filed the appeal before the learned lower appellate court under section 406 of the Act, 1949.

10. Section 406 of the Act, 1949 provides that subject to the provisions as contained in the Act, appeals against any rateable value or tax fixed or charged under this Act shall be heard and determined by the Judge. Judge for this purpose of Municipal Corporation limits of the City of Ahmedabad is Small Causes Court Judge. Against an order fixing the rateable value of the premises, an appeal does lie to the Small Causes Court under this section. From the memo of appeal as well as the order impugned therein it is clear that the appeal of the appellants is against the order fixing the rateable value of their premises in dispute. In the presence of these facts it is difficult to accept how the lower appellate court has held that the appeal has not been filed under section 406 of the Act, 1949. Section 407 of the Act, 1949, lays down that for the purposes of section 406 of this Act, cause of complaint shall be deemed to have accrued in the case of an appeal against a rateable value, on the day when the complaint made to the Commissioner against the said value is disposed of. On

this fact that the complaint filed by the appellants against the rateable value fixed has been dismissed and thereafter the appeal has been preferred by them the learned counsel for the respondent-Corporation does raised any issue. The learned lower appellate court has taken the matter very cursorily and substance thereof has not been gone into. Merely on the form, that on the memo of appeal, the provisions of section 406 or 407 of the Act, 1949 has not been mentioned, the learned lower appellate court has taken the view that the appeal has not been filed under the said sections. The substance of the matter if would have been looked into, there leaves no doubt in the mind of the Court, that it was an appeal filed by the appellants against the order fixing the rateable value of the premises. Not only this, prayer made in the appeal is also very specific and clear, and above that, in the list of documents this order which has been impugned in the appeal has also been referred to. It is true that in the memo of appeal, the appellants have very specifically not mentioned section 406 of the Act, 1949, but non-mentioning of that provision itself cannot be taken to be objectionable and that to, to the extent where it is held that the appeal is not filed under the said provision. Non-mentioning of the provision under which the appeal is filed is insignificant and/or of no substance where in this case against the impugned order appeal is provided under the Act, 1949. So in case the right of appeal in the matter which was there before the lower appellate court is traceable in some provisions of the Act, 1949, merely non-mentioning of the said provision on the memo of appeal will not be fatal to the maintainability of the appeal and more so it cannot be taken to be a ground sufficient for the dismissal of the appeal. Taking into consideration the totality of the facts of this case, I am satisfied that the finding of the learned lower appellate court that the appellants have not filed the appeal under section 406 or 407 of the Act, 1949 is erroneous and same cannot be allowed to stand.

11. Now I may advert to another ground given by the learned lower appellate court for dismissing the appeal of the appellants. Section 406 of the Act, 1949, as referred earlier in the foregoing paras, provides in which case the appeal will lie, and against the order fixing the rateable value of the premises, an appeal is provided before the Small Causes Court. The learned lower appellate court has proceeded under the assumption and presumption that only where the quantum has been challenged, the appeal is maintainable under section 406 of the Act, 1949. It is too narrow and conservative

approach of the learned lower appellate court in this case. Section 406 of the Act, 1949 explicitly provides for appeal against any rateable value fixed of the premises. The right of appeal is a creature of statute and it is settled law unless it is provided under the Act it cannot be availed of or it cannot be permitted to be availed of by the Courts. Converse to it, where the right of appeal is provided under the statute that section should be interpreted in the manner and the way so that it may advance justice to the citizens and the interpretation to the provisions should not be conservative or in the manner and the way even in the case where the appeal is provided the right of appeal is taken out of that provision. The rateable value of the premises which are situated within the limits of the Corporation are to be fixed by the competent officers under the Act, 1949. Against the fixation of the rateable value of the premises, appeal is provided and the Court would not have been misguided and mislead in the way that appeal is only against the quantum. The quantum may vary from zero to any value as determined by the competent authority. It is true that in the appeal under section 406 of the Act, 1949, the appellants cannot challenge the validity of the levy of tax on the premises situated within the limits of Corporation but the appellants can challenge the order fixing the rateable value of the premises on the ground that no value could have been fixed as the premises are situated beyond Municipal limits of the Corporation. This contention raised, if accepted, then naturally the court will hold that the rateable value of the premises could not have been made. That decision has nothing to do with the power of the Corporation to levy the tax as well as to determine the rateable value of the premises situated within its limits. In case the premises are not situated within the limits of the Corporation and still the Corporation has determined the rateable value thereof then while challenging that order in the appeal, the aggrieved party has all the right to raise the ground which goes to the root of the matter, that as the premises do not fall within the limits of the Corporation this order deserves to be set aside. It is one of the grounds to challenge the legality, validity and propriety of the order and it can certainly be gone into in the appeal by the learned lower appellate authority i.e. the Small Causes Court. I fail to see how this point cannot be gone into by the appellate court in such cases. This point is open to the holder of the premises before the Taxation Officer, and against the order finally passed by the Taxation Officer an aggrieved party has the right of appeal and he can certainly make it to be one of the

grounds of challenge to the impugned order. In case this ground is excluded from consideration or held to be not open to be raised by an aggrieved party in an appeal filed under section 406 of the Act, 1949, it will amount to denial of statutory right of appeal, which is provided under the statute. I fail to see how an aggrieved party against the order of the Corporation fixing the rateable value of the premises in dispute cannot be permitted to raise this ground of challenge to such order in the appeal. Learned counsel for the Corporation has utterly failed to point out any provision from the Act, 1949 and particularly from the provisions of section 406 or 407 of the said Act where the aggrieved party against the order of fixation of the rateable value of the premises is precluded from raising the ground that as the premises fall outside the limits of Corporation, the rateable value thereof could not have been fixed. The provisions of the Act under which statutory right of appeal against the given orders is provided should be interpreted in the way which extends the right of appeal and it should not be construed in the way where it restricts the right of appeal. The provision should not be construed so rigidly as it may result in taking away the right of appeal of the aggrieved party provided under the statute. The appeal is continuation of the original proceedings and the powers of the appellate court are coextensive with the powers of the lower authority. It is open to the holder of the premises to raise this point before the Taxation Officer that for the reason the premises are situated beyond the local limits of the Corporation, its rateable value could not have been fixed and in case this point can be raised before the said officer then while challenging the final order passed in the proceedings against which the appeal is provided, the aggrieved party cannot be precluded from raising of this point before the appellate court. In the instant case, the appellant had a statutory right to prefer an appeal against the order of the respondent fixing the rateable value of the premises. The right to prefer an appeal is a right created by statute. No party can file an appeal against any order as a matter of course in the absence of a suitable provision of some law conferring on the party concerned the right to file an appeal against any order. As it being a creature of the statute, the question whether there is a right of appeal or not, will have to be considered on interpretation of the provision of the statute. In the case of Vijay Prakash D. Mehta vs. Collector of Customs, reported in 1988 (4) SCC 402, their Lordships of the Apex Court said that the right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. If the statue gives a right of

appeal upon certain conditions, it is upon fulfillment of those conditions that the right becomes vested and exercisable to the appellant. Section 406 of the Act, 1949, it is to be noticed at the cost of repetition, provides statutory right of appeal against fixation of rateable value of the premises. This statutory right of appeal is not circumscribed by any condition. The approach which has been made by the learned lower appellate court in this matter is accepted it will amount to abrogating of the right of appeal provided under section 406 of the Act, 1949 to the holders of the premises against the order fixing the rateable value thereof. Maintainability of the appeal under the Act, 1949 cannot be adjudged from the point or ground of challenge to impugned order raised in the memo of appeal. It can be determined on the basis of the pleadings and grounds made and the stated relief claimed in the appeal.

12. The matter can be looked into from another angle also. Leaving apart the question of interpretation of statue, it is to be noted that in case the judgment of the learned lower appellate court is accepted then the Court has to read section 406 of the Act, 1949 in the manner that in the appeal arising out of the fixation of the rateable value of the premises, challenge cannot be made to it though the premises are not situated within the limits of the Corporation. Excluding this point from consideration by the appellate court, the tax on the property shall be there though otherwise it is not taxable. The right of appeal is conferred under the statute and aggrieved party has the right to challenge the legality, propriety and correctness of the impugned order on all the legally permissible grounds available to him. The availability of the grounds to challenge the impugned order includes the ground that the authority has no jurisdiction in the matter or the rateable value of the premises could not have been fixed as the premises fall outside the Municipal limits of the Corporation. The challenge to the orders which are appealable under section 406 of the Act, 1949 cannot be restricted as it is sought to be done in the present case by the learned lower appellate court. In case, such a narrow interpretation is given to section 406 of the Act, 1949, it will not subserve the purpose for which the statutory right of appeal has been provided thereunder. The provisions of the appeal have to be read with reference to the order against which the appeal is provided thereunder. In case where the appeal is provided against the order, the appellants have the right to raise all the legal contentions challenging the impugned order which includes the ground that the premises fall outside the

Municipal limits of the Corporation, its rateable value could not have been fixed.

13. The premises - whether falls within the Municipal limits of the Corporation or not, is a question of fact on which the appellate court has all the powers to go into. In case it is established as a fact that the premises are not situated within the limits of the Corporation then certainly no rateable value thereof could have been fixed and consequent thereupon there is no question of any levy of property tax. In case such a vital issue is excluded from consideration of the appellate court in appeal filed under section 406 of the Act, 1949, it will result in multiplicity of proceedings as per what the learned counsel for the appellants contended that to take the decision on this issue the holders of the premises have to go to the civil court or to come before this court by way of filing a writ petition. Thereafter in case those proceedings are decided against the holders of the premises then they can file an appeal against the order fixing the rateable value of the premises. It does not appears to be the intention of the legislation nor it could have been to provide the restricted right of appeal under section 406 of the Act, 1949. In the case in hand, I find that the appellants filed civil suit No.165/93 in this very matter and there the defence has been taken by the Corporation that the question raised in the suit can only be decided by the Small Causes Court at Ahmedabad in appeal filed under section 406 of the Act, 1949. It is further stated that the only remedy open to the plaintiff therein, the appellants herein, is to file an appeal under section 406 of the Act, 1949 provided that the plaintiff has got any grievance about the assessment fixed by the Municipal Corporation. It is further stated that the legislature has provided statutory remedy of appeal wherein all the questions raised by the plaintiff in the suit can be decided in the appeal under section 406 of the Act, 1949 and therefore the jurisdiction of the civil court is barred. In the suit, the defence has been taken by the Corporation that the suit is not maintainable as the appellants have a right of appeal in the matter under section 406 of the Act, 1949. It is really shocking that when the appellants filed an appeal before the Small Causes Court, the plea has been taken that the same is not maintainable as this point in particular is not available to the appellants to be raised in the appeal. This plea taken in the appeal is totally contrary to the defence, what has been taken by the respondent in the civil suit. From these facts, what I find is that the approach and purpose of the Corporation is to see that

whosoever initiate any proceedings against it, the same has to be defended and to the extent whether the defence taken is tenable or not. The purpose appears to see that the proceedings initiated are dismissed. In that process, the Corporation some times forget about what defence has been taken by it in the earlier proceedings. Some times contrary defence is being taken the present case is illustration thereof. Be that as it may. In the suit filed by the appellants, it was not the defence of the respondent-Corporation that against the order impugned in the appeal only remedy was to file the writ petition before this Court. The defence was that the appeal is maintainable which excludes any other remedy to be taken by the appellants. The pleadings made in the written statement exclude the contention which is now made that against the impugned order the challenge made on the ground that the premises falls outside the limits of the Corporation, available remedy is either to file a suit or a writ petition before this Court. Remedy under Article 226 of the Constitution being an extraordinary remedy is not a remedy as of right. This court under Article 226 of the Constitution may not entertain the writ petition of the aggrieved party where the statutory right of appeal is available against the order impugned therein. The remedy under Article 226 of the Constitution is available where no other remedy is available against the impugned order to the aggrieved party. Where under the statute alternative remedy is available normally Court should not interfere and direct the parties to have recourse to the said remedy. The Apex Court in the case of Shyam Kishore vs. Municipal Corporation of Delhi reported in 1993 (1) SCC 22 dealing with some what similar contention of the learned counsel for the Corporation raised in this case, observed :

> "The contention on behalf of the Corporation to read the provision rigidly and seek to soften the rigour by reference to the availability of recourse to the High Court by way of a petition under Articles 226 and 227 in certain situation and departmental instructions referred to earlier does not appear to be a satisfactory solution, the departmental instructions may not be always followed and the resort to Article 226 and 227 should be discouraged when there is an alternative remedy."

In a case where the disputed questions of fact are involved for adjudication the writ may not be proper and effective remedy. High Court may decline to interfere in such matter under Article 226 of the Constitution.

14. Section 406 of the Act, 1949 provides a right of appeal against the order fixing the rateable value of the premises. Order impugned by the appellants in the appeal before the appellate court relates to the fixation of rateable value of their premises. This order is undoubtedly appealable under sec. 406 of the Act, 1949. The dispute is that a particular ground of challenge to this order is not available in the appeal. That as I have dealt with in the foregoing paras cannot be taken to be a ground to hold that the impugned order is not appealable. The order can be challenged on all permissible grounds and that has nothing to do with the right of appeal. Right of appeal has to be considered with reference to the order which is challenged in the appeal and in case that order falls within the four corners of the orders which are made appealable under the provisions, the right of appeal cannot be curtailed or abrogated on saying that particular ground of challenge to the order is not available. Section 406 of the Act, 1949 expressly provides the appeal against the fixation of rateable value of the premises and when the statutory right of appeal is there, the appellants are perfectly legal and justified to file the appeal.

15. In the result, this appeal succeeds and the same is allowed with costs. The order dated 20/2/1998 passed in Municipal Valuation Appeal No.11969 of 1994 by the 10th Small Causes Court, Ahmedabad is quashed and set aside. The matter is sent back to the said Court to decide afresh the appeal of the appellants on merits.

****

zgs/-